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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 26, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

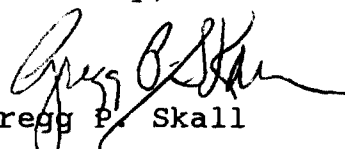
RE: Comments of Robert B. Mahaffey
MM Dkt. 97-234, GC Dkt. No. 92-52, GEN Dkt. 90-264

Dear Ms. Salas:

Transmitted herewith is the original and four (4) copies of the "Comments" filed by Robert B. Mahaffey in the above-referenced proceeding.

Should you have any questions regarding this matter, please contact undersigned counsel.

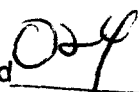
Sincerely,


Gregg P. Skall

Counsel for Robert B. Mahaffey

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of:)	
)	
Implementation of Section)	
309(j) of the Communications)	
Act - Competitive Bidding for)	MM Docket No. 97-234
Commercial Broadcast and)	
Instructional Television Fixed)	
Service Licenses)	
)	
Reexamination of the Policy)	
Statement on Comparative)	GC Docket No. 92.52
Broadcast Hearings)	
)	
Proposals to Reform the)	
Commission's Comparative Hearing)	GEN Docket No. 90-264
Process to Expedite the)	
<u>Resolution of Cases</u>)	

TO: THE COMMISSION

COMMENTS OF

ROBERT B. MAHAFFEY

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Counsel for Robert B. Mahaffey

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Before the
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TO: THE COMMISSION

COMMENTS OF ROBERT B. MAHAFFEY

Robert B. Mahaffey, by and through his attorney, hereby submits the following Comments in response to the Notice of Proposed Rulemaking, released on November 26, 1997, in this proceeding. The Notice of Proposed Rulemaking, ("NPRM") was released in response to the Balanced Budget Act of 1997, Pub. L. 105-33, 11 Stat. 251 (1997) (the "Budget Act"), which gave the Federal Communications Commission ("FCC" or "Commission") authority to auction spectrum for broadcast facilities.

As discussed more fully below, Robert B. Mahaffey ("Mahaffey") supports the Commission's interpretation of the provisions that would permit him to participate in a future auction. Further, Mahaffey encourages the Commission to permit settlements that would

resolve the mutual exclusivity between applicants who filed on either side of the July 1st deadline established by the Budget Act.

I. INTRODUCTION

On April, 25, 1997, the Commission released the Report and Order in MM Docket 96-217, in which it allocated Channel 232C3 to Humboldt, Kansas. In re Amendment of Section 73.202(b) Table of Allotments, FM Broadcast Stations. (Humboldt, Kansas), Report and Order, 12 FCC Rcd 4899 (1997). The Report and Order established a filing window for applications to be filed between June 9, 1997, and July 10, 1997. On June 16, 1997, Michael D. Sutcliffe filed his application for the allotment, and on July 9, 1997, Robert B. Mahaffey filed his mutually exclusive application. No other applications were filed for this channel.

On August 5, 1997, the President signed the Budget Act which afforded the Commission the authority to hold competitive bidding auctions for mutually exclusive applications filed prior to July 1, 1997, and required the Commission to hold auctions for those applications filed after July 1, 1997. Specifically, Section 3002(a)(3) of the Budget Act provided:

With respect to competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997, the Commission shall--

"1) have the authority to conduct a competitive bidding proceeding pursuant to subsection (j) to assign such license or permit;

"(2) treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding; and

"(3) waive any provisions of its regulations necessary to permit such persons to enter an agreement to procure the removal of a conflict between their applications during the 180-day period beginning on the date enactment of the Balanced Budget Act of 1997.".

Pub. L. 105-33, 111 Stat. 251 (1997) § 3002(a)(3). By this historic act, Congress eliminated the nearly seventy year-old practice of holding comparative hearings to resolve mutually exclusive broadcast applications.

With its marching orders, the Commission released the NPRM, wherein it determined that Congress intended to give it the discretion to hold competitive bidding auctions where competitive applications were filed prior to July 1st, and it was required to hold competitive bidding auctions for those applications filed after July 1st. NPRM, ¶ 13.

The Commission noted, though, that there may be occasions where applications were filed in response to a filing window that began prior to July 1st, but ended after July 1st. Among these cases, it further concluded, "where [only] one application was filed by June 30, 1998 and the other mutually exclusive applications were filed thereafter", it is required to hold an auction. ¶ 24. Further, it determined that the waiver and settlement provisions do not apply in this situation. Id.

Therefore, under the Commission's proposed statutory construction, Mahaffey and the other applicant in the Humboldt FM proceeding would not be able to participate in settlement negotiations, and may face other bidders when the Commission holds its auction for the Humboldt, Kansas allotment.

II. COMMENTS

Mahaffey supports the Commission's determination insofar as it concludes that, as in the Humboldt, Kansas proceeding, where there is one application filed on either side of the July 1st deadline, both applicants should be eligible to participate in a future auction. This analysis is clearly supported by Congress' intent to have at least two applicants to participate in a competitive bidding auction. As such, Mahaffey expresses his support for that part of the Commission's interpretation of the Budget Act.

However, Mahaffey does not agree with the Commission's interpretation that, in this same situation, the two applicants can not reach settlement prior to an auction. While the Commission concludes that the Budget Act limitation on possible waivers for settlement negotiations applies only to those applications filed prior to July 1,^{1/} it also recognizes that this requirement as

^{1/} Specifically, the NPRM stated that:

"[t]he waiver requirement would not apply...to a single pre-July 1, 1997 application that is mutually exclusive with one or more applications filed after that date, even if all applications were filed pursuant to a filing period that opened before July 1, 1997."

applied to the various possible scenarios for applications filed around the July 1, 1997 date does not present a rationally-consistent application of the statute or its policy goals. Further, the Commission recognizes that a strict application of the statutory "plain meaning" provides inequitable results, which may in fact deny constitutionally protected due process of law to certain applicants who filed their applications without any prior knowledge that July 1, 1997 would be a cut-off date for their rights, or that might in fact require that their applications be dismissed^{2/}. Indeed, while the Commission asks for comment on whether there are any other legally permissible interpretations of Section 309(1), it is obvious that the one it suggests is not.

NPRM, ¶ 27.

^{2/} "We recognize that in certain circumstances, this may lead to a rather harsh result, particularly where it requires the dismissal of applicants that timely filed within an announced filing period..." ¶ 25.

The Fifth Amendment of the Constitution specifically protects the procedural due process rights of US citizens. U.S. Const. Amend. V. In the instant matter, where the parties will not participate in a comparative hearing, the harsh result will have a greater effect. See Fuentes v. Shevin, 407 U.S. 67 (1972) (holding that:

If the right to notice...is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented...But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.

Id. 81-82.)). The holding of an auction, rather than a comparative hearing based solely on what date one files within a filing window subject to public notice requirements clearly falls under this same consideration. Without revising the window notice filing dates pursuant to a subsequent public notice, the applicant will be irreparably harmed.

Similarly, there is no rational non-arbitrary basis upon which the Congress could have concluded that in situations where a window filing period straddles July 1, the settlement waiver applies only where multiple applications were filed prior to that date, but not to situations where there were only one application filed before and one after that date. The legislative history reveals no cogent rationale for marking this distinction, making it totally arbitrary.

Indeed, if the only purpose could be to require auctions in an arbitrary category of cases so that the government can receive the proceeds rather than allowing settlements between single pre- and post-July 1 applicants, the distinction is capricious as well. Rather than providing for auctions, the reading given the statute by the Commission actually turns the process into a lottery for selecting the category in which one's application falls for processing, determined following the closing date for filing all applications but based solely upon the actual date of filing.

It is clear that Congress passed this statute in the heat and tumult surrounding its own deadlines for passing a Budget Bill. A more rational way to interpret the statute would be to limit the cut-off date of Section 3002(1) to exclude settlements where the window filing period began after July 1, 1997.

Such an interpretation would rationalize all of the inconsistencies involved in interpreting the statute otherwise. July 1, 1997 would then serve as the bright line prior notice test

Congress must have intended, without wreaking injustices upon unknowing applicants. All mutually-exclusive applications filed during window periods which began on or before July 1, 1997 could be settled by the applicants pursuant to the window filing settlement period and all applications filed in windows which began after July 1, 1997 would be required to be decided by government auction. The harsh result referred to by the Commission in paragraph 25 would be eliminated as there would be no requirement for a constitutionally suspect procedure to dismiss post hac certain applications filed pursuant to a Commission's Public Notice while allowing others also filed pursuant to that same Public Notice to remain valid.

This analysis may also be supported by a rational reading of the Conference Report that accompanied the Budget Bill. H.R. Conf. Rep. 217, 105th Cong. 1st Sess. 572 (1997). The Conference Report specifically admonished the Commission to not overlook "...negotiations, or other tools that avoid mutual exclusivity."

III. CONCLUSION

Mahaffey supports the Commission's intention to permit those parties in situations where there is a single pre-July 1 application to participate in competitive bidding auction. This decision falls squarely within the explicit strict construction of Congress' language and protects these applicants.

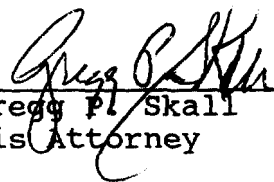
Furthermore, Mahaffey encourages the Commission to reexamine

its determination that the same applicants who filed their application pursuant to a filing window that opened prior to July 1st would not be eligible to participate in settlement filed pursuant to Section 3002(1)(3). Mahaffey urges the Commission to find that the true intent of Congress would be served better in affording all applicants whose applications were filed pursuant to a window which opened prior to July 1, 1997 the ability to utilize the settlement provisions of the Budget Act.

Respectfully submitted,

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By


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January 26, 1998